91-1076

Supreme Court, U.S.
FILED
APR 17 1992
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH S. KNIGIN,

*Petitioner*,

vs.

GUY J. MANGANO, Individually and as Presiding Justice of the Appellate Division of the State of New York – Second Judicial Department, and GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (NEW YORK),

*Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

## PETITION FOR A WRIT OF CERTIORARI

KENNETH S. KNIGIN
*Petitioner Pro Se*
847 Second Avenue
New York, New York 10017
(212) 755-5015

## 1. Questions Presented

ONE: Can the Appellate Division of the Supreme Court of the State of New York (2nd Judicial District) abrogate the procedural due process requirements, to which Petitioner is entitled by imposing a sanction contrary to its own findings and judgment?

TWO: Do material inconsistent findings, included in the judgment of the Appellate Division, constitute a denial of procedural due process?

THREE: Does the imposition of the sanction of disbarment constitute cruel, unusual and excessive punishment when the Court imposing the sanction has found the Petitioner to be entitled to mitigating consideration?

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## JURISDICTION OF THE UNITED STATES SUPREME COURT

Jurisdiction in this Court was invoked under 28 USC 1257(a) following exhaustion of all State proceedings, including that to the New York State Court of Appeals.

## STATEMENT OF THE CASE

Disciplinary Proceeding

By report of the Special Referee (dated September , 1989)[1] (Exhibit 1). There was sustained against Knigin, charges One, Two, Four and Five. In addition the Special Referee found "...The Referee urges consideration of the mitigating circumstances..." (A-25)

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[1] Day of month omitted by Special Referee.

The evidence alleged that Knigin had converted and/or failed to account for escrow funds totalling $17,900. Bank records showed the sum had been initially erroneously credited to the escrow account twice, Knigin claimed that caused him to inadvertently withdraw funds properly belonging to his client. All of the other charges flowed from this one singular event.

The Referee's report is replete with contradictory findings including notice of the bank statements indicating that the deposit had been credited twice, while ignoring the claim of unintentional withdrawal; failed to find that the initial reason for the escrow account falling below the prescribed amount was due to an improper withdrawal by the bank which the bank replaced the following month, all transactions were confirmed by the

official bank account record in evidence before the referee and the Appellate Division; acknowledging the mitigating circumstances that placed records beyond recapture while finding Knigin intentionally disregarded a judicial subpoena of the respondent by failing to produce the self-same records; failing to maintain an escrow account ledger book while also finding failure to produce same pursuant to judicial subpoena; failed to find that Knigin responded to each and every requirement of the Disciplinary Committee, except as to the production of records which he could not locate after exhaustive search, notwithstanding unrefuted evidence in that regard; failed to find that Knigin supplied the Disciplinary Committee with the names, addresses and account numbers of each and every bank account, regular or escrow, maintained by him for a period of

not less than 15 years before the disciplinary proceeding and that the Disciplinary Committee either did or could subpoena such records in lieu of Knigin's excusable inability to produce; all of the foregoing in addition to failing to acknowledge that a sum in excess of the $17,900 claimed converted and/or failed to account for, was repaid to the client eight months prior to the initiation of any disciplinary proceedings, which the subject client's attorney ultimately withdrew with a written statement to the Disciplinary Committee of "no further interest."

Moreover, notwithstanding the request of Knigin before the New York State Court of Appeals and the Appellate Division he was further denied due process of law, when those State Courts refused to consider and rule on his application

relating to the term of punishment. Knigin had been suspended from the practise of law, three years prior to the disbarment, by the Appellate Division, by reason of his alleged failure to "cooperate fully" with the Disciplinary Committee. The Referee's Report, containing a finding of mitigating circumstances, verifies that any lack of cooperation related to the production of records was unintentional, hence excusable. Accordingly, as originally pleaded by Knigin he should not have been suspended in the first instance. The record verifies his total cooperation with the Committee, except as related to production of records. The Appellate Division, as previously noted, agreed with the findings of the Referee. Accordingly, Knigin's three year suspension prior to the disbarment was unwarranted. Whether the suspension was warranted or not, when

he requested that any sanction give credit for that suspension period, he was submitting a valid due process request. Additionally, he was wrongfully required to bear the stigma, through the disciplinary proceeding, of a "Suspended Attorney."

Failure of the Appellate Division or the Court of Appeals to respond to the request constitutes a further denial of due process herein.

THE APPELLATE DIVISION

The Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, which has jurisdiction over attorneys practising law in that State, including Knigin, rendered a unanimous Opinion and Order dated October 1, 1990 (Exhibit II) after reviewing Referee's Report and "....all of the

evidence...." and stating "...we are in full agreement with the report of the Special Referee." Thereupon finding Knigin "....guilty of serious professional misconduct," and disbarring him.

## EFFORTS TO APPEAL THE DECISION AND ORDER OF THE APPELLATE DIVISION TO THE NEW YORK STATE COURT OF APPEALS

After receipt of the disbarment order Knigin sought to appeal to the highest court of the State of New York, the Court of Appeals. Such right, under the circumstances could accrue only upon obtaining permission for such appeal from either the Appellate Division or the Court of Appeals.

An application for such leave was made to the Appellate Division and was denied by Decision and Order dated June 26, 1991 (Exhibit III). In accordance

with applicable rules an application for such leave was made directly to the Court of Appeals. This relief was denied by Order dated October 15, 1991 (Exhibit IV). A motion to reargue the motion made to the Court of Appeals was then brought and was denied by Order dated January 14, 1992 (Exhibit V).

By virtue of the foregoing procedures Knigin had exhausted every possible avenue for review of the disciplinary proceeding, available to him within the jurisdiction of the State of New York, and was therefore required to pursue this relief, to this Court, pursuant to 28 USC 1257(a).

## THE ISSUE OF FAILURE OF PROCEDURAL DUE PROCESS - UNITED STATES CONSTITUTION AMENDMENTS V AND XIV.

The issue of failure of procedural due process in connection with these

proceedings was raised by Knigin in the course of the proceedings before the New York State Court of Appeals on or about August 4, 1991 in a certain Memorandum of Law in Support of the Motion for Leave to Appeal. These issues appear therein at Points III and IV (Exhibit VI).

## THE ISSUE OF VIOLATION OF RIGHTS PURSUANT TO ARTICLE VIII OF THE UNITED STATES CONSTITUTION

The action of disbarring Knigin from the practise of law, after finding mitigating circumstances for the acts complained of by the respondent, constitutes cruel, unusual and excessive punishment in violation of Article VIII of the United States Constitution. The issue of such violation was raised by Knigin in the course of the proceedings before the New York State Court of Appeals on or about August 4, 1991 in a certain Memorandum of Law in Support of the Motion

for Leave to Appeal. These issues appear therein at Points III and IV (Exhibit VI).

**ARGUMENT**

Reasons for Granting Certiorari

DENIAL OF DUE PROCESS

This Court in a singular case confirmed the basic parameters employed in the conduct of disciplinary proceedings for lawyers, especially related to cases in the Second Judicial District, State of New York.[2] This decision extremely curtails the rights of lawyers and therefore must require the disciplinary process to eschew closely to the permissive program established therein. This petition is brought for the fact that, in the instant

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[2] Mildner v. Gulotta 405 F.Supp. 182 (1975), aff'd. 96 S.Ct. 1489

case, the process has wandered beyond the permitted parameters and by such action has further imposed upon the usual constitutional protections afforded to lawyers as a class, and the petitioner individually, as guaranteed by the United States Constitution - Amendments V and XIV. This further incursion must be deemed unacceptable, lest there be no constitutional protections of any kind remaining in instances such as that at bar.

It is established that disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.[3] He is accordingly entitled to

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3 Ex parte Garland, 4 Wall. 333,380; Sperack v. Klein, 385 US 511, 515, In re Ruffalo 390 U.S. 544, 88 S.Ct. 1222.

procedural due process.[4] Since by Mildner, supra that due process has been substantially curtailed, this Court must protect against an even larger erosion of rights.

This Court has stated that the courts are the proper supervisors of attorneys; that the court's decision must supercede that of a hearing referee, even without explanation, without oral argument; the Court may confirm or disaffirm the referee's report in whole or in part; may make new findings with or without taking additional testimony; that the findings and conclusions are in no way binding on the court; may pass on credibility without having the opportunity to observe the witness; and may perform all of the many

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[4] In re Oliver, 333 U.S. 257, 273.

permissive acts without argument of counsel or explanation as to the basis for the conclusions.[5]

In short this Court has embraced the state courts with awesome freedom from constitutional restraints in lawyer disciplinary cases. Since the "window of due process rights" has become so narrowed for attorneys it is essential that the rights remaining be assiduously guarded.

Prior determinations by this and other Courts have confirmed that vestiges of due process still exist for attorneys and Knigin. Since discipline constitutes "....such drastic consequences for the individual attorney that the State's power to divest one of a license to practice law

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[5] Mildner v. Gulotta, supra.

may not abrogate federally protected rights."[6] This Court has previously been moved to state, "The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."[7] "The Courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof."[8] Since disciplinary proceedings may be particularly susceptible to abuse because of their summary character it is manifest that all aspects of the proceeding be carefully monitored. "Only by providing

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[6] Erdmann v. Stevens, 458 F.2d 1205, 1210 (2Cir. 1972); In re Ming 469 F.2d 1352, 1353 (7 Cir. 1972).

[7] Johnson v. Avery, 393 U.S. 483, 490 n.11, 89 S.Ct 747, 751 n.11.

[8] Staud v. Stewart, 366 F.Supp. 1398, 1401 (E.D. Pa 1973).

that the social enforcement mechanism must function strictly within [Constitutional] bounds can we hope to maintain an ordered society that is also just."[9] But as already noted, New York's obligation to provide effective discipline must be weighed against the significant individual rights at stake. Due process requires that the procedures used in legal proceedings be appropriate to the case and just to the parties affected."[10] As Justice Goldberg commented, "Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process."[11]

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9 Boddie v. Connecticut, 401 U.S. 371, 375, 91 U.S. S.Ct. 780, 784.

10 Mildner v. Gulotta, supra 211.

11 Willner v. Committee on Character and Fitness, 373 U:S. 96, 83 S.Ct. 1175, 1182.

In the case at bar the Appellate Division 2nd Judicial Department of New York, has completely abrogated many of the imperatives of due process, to which Knigin is entitled, and in such process has rendered the entire disciplinary proceeding and its judgment a sham. With due appreciation for the court's right to disagree with a referee at anytime, to be unbound by his decision and to be free to enter judgment with or without explanation, the court in the instant case has crossed a new threshold in disregarding due process. The Referee in his report saw fit to comment as his final finding in the hearing (A-25): "In considering any appropriate sanction, the Referee urges consideration of the mitigating circumstances which caused the respondent to suffer with emotional distress related to an ongoing divorce. Additionally, the

necessity to move respondent's law office from New York City to Westchester resulted in the storage of office records in a garage and warehouse, creating difficulties in locating, retrieving and producing pertinent records subpoenaed by the Grievance Committee. Finally, the respondent made restitution in the amount of $26,500,[12] which so satisfied the client that he withdrew all charges." The referee (a retired Judge of the New York State Court of Claims), made this finding after hearing and observing not only Knigin but the complaining client as well. It is well stated that "This does not mean, however, that the referee's findings and conclusions are inconsequential. Since he has the opportunity to observe the

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12 The sum concerned herein was $17,900, the balance claimed by client for "legal fees and interest."

witnesses, and determine credibility, his decision is entitled to serious consideration by the Appellate Division."[13] It is acknowledged that even this strongly worded caveat does not serve to bind the Appellate Division, if it chooses to ignore same, for whatever reason. But in the case at bar the Appellate Division did not opt to disagree with this finding by the referee but instead totally agreed with the finding. The Court stated (A-31), "After reviewing all of the evidence, we are in full agreement with the report of the Special Referee (emphasis supplied)." The court indicated no reservations, modifications, differences or disagreements whatsoever

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[13] In re Gondelman, 258 App. Div 1085, 18 N.Y.S.2d 52 (2d Dep't) modified on other grounds, 259 App. Div. 889, 20 N.Y.S.2d 410, aff'd 285 N.Y. 624, 33 N.E.2d 553 (1941).

with the entire Referee's Report. Not a single reservation as to any part thereof. As such the Court "after reviewing all of the evidence" was in complete agreement with the Report. Any errors committed by the Referee including contradictory and inappropriate findings have become the errors and findings of the Appellate Division. Since most of the errors cannot be brought before this Court for review, the appellate or review process in the State Courts becomes of urgent importance to this Petitioner, it has until now been denied.

As a result the issues of due process denial raised before the State Courts, must be presented to this Court, in order that the sham proceeding conducted relative to this disbarment, may be reviewed and the cause put back on track.

The term mitigating or mitigation referring to circumstances is clear and unambiguous. It means "to lessen in force or intensity; make less severe, to make milder or more gentle, to calm, soften;[14] to moderate (a quality or condition) in force or intensity, to become milder;[15] and to make less severe, alleviation, reduction, abatement or dimunition of a penalty or punishment imposed by law."[16]

The referee urged the "consideration of the mitigating circumstances," which it is conceded the Appellate Division could have disregarded. But, in indicating its "full agreement with the report of the Special Referee," the finding of mitigat-

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[14] Webster's College Dictionary

[15] American Heritage Dictionary

[16] Black's Law Dictionary

ing circumstances became that of the Appellate Division. To determine otherwise totally destroys the due process requirements rendering the hearing (and the resulting findings) no hearing at all.

It is further conceded that the Special Referee had no authority to deal with sanctions to be imposed upon Knigin. But, having found mitigating circumstances, by agreeing with the Special Referee, the Appellate Division was duty bound to make the sanction "milder or more gentle, less severe, to lessen in force or intensity, to moderate, reduce, alleviate or diminish." Since disbarment represents the most onerous, severe and intense punishment which the court could impose, it obviously either disregarded or overlooked its own determination in imposing punishment. This act results in a total disregard for due process since it

serves to render the hearing and the resulting judgment, a sham. The entire hearing is rendered de minimis if the Court's own judgment is ignored in setting the sanction. What then was the purpose for the hearing in the first instance? The fact that a court can ignore the opinions of others, without explanation, is of most serious significance, but to ignore its own findings (with or without explanation) is ludicrous and reaches the very heights of due process denial.

By the aforesaid procedure Knigin has been denied any access to appellate review, of this obvious impropriety, and has been effectively deprived of any appropriate hearing and disposition. By this aborted process Knigin, who had no prior disciplinary proceeding ever initiated against him, had never received a disbarment, suspension (except in the

instant matter), or censure, has after 35 years of practise and at present age 63 years been summarily deprived of his means of livelihood without significant prospect of re-admittance to the bar during his lifetime, and has further been subjected to public disgrace. The denial of due process has rarely demonstrated such an obvious impropriety. It is respectfully submitted that this Court should permit the process to be reconstituted to allow for disposition with appropriate due process protections.

THE AMENDMENT VIII ISSUE

For the reasons hereinabove indicated, the sanction of disbarment constitutes a violation of AMENDMENT VIII of the United States Constitution, in that the sanction, pursuant to the court's find-

ings, constitutes a cruel, unusual and excessive punishment.

## CONCLUSION

The sanction of disbarment imposed upon Knigin by the Appellate Division - Second Department (N.Y.) was inconsistent with the findings of that court, which found mitigating circumstances to the acts, if any, of Knigin, and were otherwise contradictory. As such the hearing and the subsequent judgment and sanction are in denial of procedural due process as guaranteed to Knigin by the 5th and 14th amendments to the United States Constitution.

The imposition of such sanction, under the circumstances herein described, constitutes cruel, unusual and excessive punishment contrary to the protection

afforded to Knigin by the 8th amendment to the United States Constitution.

Knigin therefore prays for grant of Certiorari.

Respectfully submitted,

Kenneth S. Knigin
Petitioner Pro Se
847 Second Avenue - Suite 343
New York, New York 10017
(212) 755-5015

# APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

In the Matter of KENNETH S. KNIGIN,
A Suspended Attorney:

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT

Petitioner

-against-

KENNETH S. KNIGIN,
ADMITTED UNDER THE NAME
KENNETH SHELDON KNIGIN,

Respondent.

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**REFEREES REPORT**

This proceeding was instituted pursuant to section 90 of the Judiciary Law of the State of New York to discipline Kenneth S. Knigin, a suspended attorney and counselor-at-law, on five (5) specific charges of professional misconduct. The proceeding was ordered by the Appellate Division of the New York State Supreme Court, Second Department, dated June 2, 1988. The issues raised were referred to

the Honorable John J. Reilly (a retired Judge of the New York State Court of Claims) to hear and report.

The respondent, Kenneth S. Knigin, was admitted to practice as an attorney and counselor-at-law in all courts of the State of New York by the Appellate Division of the New York State Supreme Court, Second Department, on April 6, 1955, under the name of Kenneth Sheldon Knigin.

At all relevant times herein the respondent engaged in the practice of law in the State of New York and relevant to the charges herein, respondent maintained a law office in Westchester County, New York.

Hearings were held on October 6, 1988, March 17, 1989, March 20, 1989, and April 25, 1989. The petitioner produced

seventeen documentary exhibits and the testimony of Mr. Meyer, the respondent's client. The respondent introduced thirteen exhibits and testified in his own behalf.

The respondent as a defense alleged a lack of knowledge or intent as to all charges.

**CHARGE ONE**

Respondent, Kenneth S. Knigin, has been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation by converting and/or failing to account for funds that were entrusted to him to be held in escrow, as follows:

(1) Harvey Meyer retained respondent in or about 1985 to represent him in the sale of his cooperative apartment. Admitted

(2) Respondent prepared the contract of sale and the down payment in the amount of $17,900.00 was deposited into respondent's money market account, #2111234524101,

entitled "Kenneth S. Knigin," maintained at State Bank of India on or about February 21, 1985. Admitted

(3) The closing occurred on April 25, 1985. -------- Admitted

Respondent, despite demands from Meyer, did not release the down payment which he was holding in escrow at that time. Denied

(4) The bank records of respondent's money market account, #2111234524101, maintained at the State Bank of India, reflect that as of February 22, 1985, the balance in the account had fallen to $3,905.00. The balance as of March 4, 1985 was $123.00 and the closing balance as of April 5, 1985 was $84.00 -------- Admitted

as a result of respondent having converted escrow funds entrusted to him. During this entire period, respondent was required to hold $17,900.00 in escrow. Denied

The respondent admitted all the factual allegations of the subparagraphs of Charge One except he denied so much of subparagraph (3) that stated:

> "Respondent,....despite demand from Meyer, did not release the down payment which allegedly he was holding in escrow at that time (April 25, 1985)." (Parentheses added for clarification)

Likewise in regard to subparagraph (4), while admitting that the closing balance of his client's escrow account as of April 25 was reduced to $84.00, respondent denied that it was "as a result of respondent's having converted funds entrusted to him."

At the outset, the Special Referee finds that respondent admitted that he received, as attorney for his seller-client, a down payment check in the amount of $17,900.00 at the execution of the contract to sell his client's cooperative apartment on February 13, 1985. (TH p 200)[1]

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Note 1: Reference is made to the page of the Hearing Transcript.

In the above regard, the respondent testified:

> "A. I immediately deposited it in an escrow account maintained by me in the State Bank of India, 460 Park Avenue, New York, New York." (TH p 200)

The petitioner's Exhibits 3 and 15 (monthly account statements from the State Bank of India) established that the pertinent escrow check was deposited and credited to respondent's interest bearing money market deposit account on February 14, 1985. The cancelled check (Petitioner's Exhibit 3) by bank stamp indicated that the funds were collected from the Amalgamated Bank of New York as of February 15, 1985.

Petitioner's Exhibit 15 established that as of January 31, 1985, the respondent had a balance of $263.25 in his money market deposit account. Clear and

convincing evidence consisting of a February 14, 1985 itemized check #197 withdrawal of funds in the amount of $2,000.00 against the balance of $263.25 (Petitioner's Exhibit 15) established that respondent created a deficit in the account of $1,736.75.

Obviously, on the same day, February 14, 1985, the respondent covered the deficit of $1,736.75 by depositing his client's escrow check in the amount of $17,900.00 which was immediately reduced by the existing deficit to $16,163.25. Thus it appeared that prior to any possible allegation of misleading bank credits or debits on the part of the State Bank of India, the respondent had misappropriated $1,736.75 of his client's escrow down payment trust funds. (Petitioner's Exhibit 15)

The undisputed evidence established that as of February 14, 1985, the closing escrow balance was in the total amount of $16,163.25 and that the correct opening balance as of February 15, 1985 was in the same amount of $16,163.25. (Petitioner's Exhibits 5, 15)

Surprisingly, the respondent established by his testimony that he kept a precise checkbook account of all deposits and withdrawals as follows:

> "A. I had no ledger book. All our accounts were maintained in a checkbook. I am trying to find my regular working checkbook for that period of time but not an escrow." (TH p 8)

At page 13 of the hearing transcript the respondent testified:

> "A. We do not maintain a ledger book per se. We maintain a checkbook where all entries are in the checkbook."

In regard to the bank's statement entries as set forth in petitioner's Exhibits 5 and 15, the respondent testified in answer to the question:

> "Q. Was there to your knowledge a checkbook that was actually maintained?"
>
> "A. We always maintained a very precise checkbook of every single account whether it was a business account or escrow account and that checkbook was maintained in the State Bank of India for the escrow account that covered this particular transaction." (TH p 260)

Significantly, the respondent admitted that it was in fact based on his own precise checkbook account that he maintained in regard to his clients' escrow trust funds that he was alerted to interrogate the officials of the State Bank of India concerning the credits and a transfer debit which was itemized on petitioner's Exhibits 5 and 15 as follows:

> "The witness: It said transfer debit, $17,901.25. I couldn't understand why the bank would have transferred out a debit of $17,901.25. We had no such transaction indicated in our checkbook and I immediately telephoned the bank to inquire as to what it was all about. (TH 211)

Thus, the evidence established that apart from any statements from the State Bank of India, based on respondent's own checkbook records, the respondent knew or should have known at all times what was the resultant balance in his escrow account immediately after he made a withdrawal by check.

It is difficult to understand the respondent's contention that his inability to produce the checkbook account at the hearing could alter the knowledge it provided to him at the times he made and

recorded check deposits and withdrawals from his clients' escrow account.

With the above facts in mind, the Special Referee finds that the uncontroverted evidence contained in petitioner's Exhibits 5 and 15 established that the respondent, during the period between February 14 and April 5, 1985, misappropriated all but $84.00 of his client's, Meyer's, escrow trust fund.

Based on the above finding, the Referee further finds that as of April 25, 1985, when respondent was required to turn over the escrow money at the contract closing, respondent knew or should have known that he had used, for his own purposes, the entire escrow trust fund.

Thereafter, the continuing difficulties encountered by the respondent in attempting to make reimbursement to his

client of the misappropriated escrow funds was evidenced by: (1) the Sterling Bank returning respondent's check in the amount of $16,660.28 for insufficient funds, (2) the institution by his client of a lawsuit to recover the escrow trust funds, and (3) the in-court settlement of the lawsuit in which respondent paid his client $26,500.

Charge ONE was sustained.

**CHARGE TWO**

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit and misrepresentation and that adversely reflects on his fitness to practice law as follows:

(1) Charge One is repeated, reiterated and realleged as if more fully set forth herein.

(2) In or about August, 1985, respondent forwarded to Meyer a check in the amount of $16,660.28.--- Admitted

which represented an "adjusted reimbursement of the escrow account." Denied

(3) The check was written against an account maintained by respondent at Sterling National Bank and Trust Company, account #035-52804-07, which account is entitled "Kenneth S. Knigin." In testimony before petitioner on May 5, 1987, respondent stated under oath that said account was a business checking account and not an escrow, trust of special account. Admitted

(4) When Meyer presented the check for payment, it was returned as uncollectible because of insufficient funds. Admitted

(5) In or about December, 1985, respondent allegedly admitted his wrongful conduct---------- Denied

and paid Meyer the sum of $20,000.00, which amount represented the down payment of $17,900.00 plus interest due Meyer from the time of the April, 1985 closing. Admitted

The respondent's admission that he kept a checkbook account of all deposits

and withdrawals from the so-called escrow money account which he maintained in the State Bank of India established that he knew or should have known as of April 5, 1985, that he had knowingly converted all but $84.00 of the sum of $17,900.00 entrusted to him to be held in escrow pending a closing date of the contract of sale of his client's cooperative apartment. (Petitioner's Exhibits 3, 4, 15; TH pp 211, 213, 261-265)

The respondent's contention that he was misled by erroneous entries made by the State Bank of India as to the correct deposits and withdrawals made by respondent against the escrow money account is against the weight of the evidence and is found to be without merit. (Petitioner's Exhibits 3, 5, 15; TH pp 211, 213, 261-265)

The respondent issued a check for $16,660.28 on the Sterling National Bank and Trust Company at a time he had insufficient funds in that bank (Charge TWO, subparagraphs (3)(4)). The said check was given in order to reimburse his client, Mr. Meyer, for the funds which respondent had misappropriated from an escrow trust.

The uncontroverted evidence established that respondent's client, Mr. Meyer, had to institute a lawsuit in order to recover the escrow money plus interest which had been entrusted to respondent which respondent had used for his own purposes.

Charge TWO was sustained.

**CHARGE THREE**

Respondent has been guilty of engaging in conduct that adversely reflects on his fitness to practice law by failing to maintain a duly constituted escrow account and of commingling funds as follows:

(1) Charges One and Two are repeated, reiterated and realleged as if more fully set forth herein.

(2) Respondent maintained an escrow account, #02870544, entitled "Kenneth S. Knigin, Special" at Citibank for the period April 1980 to July 1981------- Admitted

in which account respondent commingled clients' and personal funds and caused checks to be issued for both escrow and personal obligations. Denied

The petitioner had the burden by a fair preponderance of the credible evidence to establish that: (1) respondent during the period between April 1980 and

July 1981 commingled escrow funds and personal funds in the said account at Citibank.

While the petitioner produced evidence which established the existence of a special Kenneth S. Knigin account #02870544, petitioner failed to adduce any evidence that established that any specific client entrusted escrow funds to the respondent which were commingled with the respondent's personal funds during the period April 1980 to July 1981. The respondent's testimony, which asserted that there were no escrow funds in the account at the time he used it for his personal expenses was uncontroverted.

Charge THREE was NOT sustained.

**CHARGE FOUR**

Respondent, Kenneth S. Knigin, has been guilty of engaging in conduct that adversely reflects on his fitness to practice law, by failing to maintain and produce, pursuant to subpoena, a ledger book or similar record and records of all deposits and withdrawals for his attorney escrow account, as follows:

(1) Charges One, Two, and Three are repeated, reiterated and realleged as if more fully set forth herein.

(2) The Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department §691.12(b), (e) and (f) (22 NYCRR §691) require an attorney, inter alia, to maintain a ledger book or similar record for all special accounts as well as the records of all deposits and withdrawals from such accounts for a period of seven years after the events which they record and to produce those

records in response to a subpoena duces tecum. Admitted

(3) Failure to maintain and/or produce the aforesaid records as set forth above, subjects the attorney to disciplinary proceedings. Admitted

(4) Respondent has failed to comply with §691.12(b), (e) and (f) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department. [22 NYCRR §691(b)(e)(f)] Denied

The Referee finds that the respondent did keep an accurate cashbook account which the Referee deems similar to a ledger book in order to reflect all deposits, withdrawals and balances of monies related to his clients' escrow account.

The Referee further finds that respondent failed to produce the cashbook account of his clients' escrow trust fund in response to a judicial subpoena duces

tecum. (Petitioner's Exhibit 9) The failure of the respondent to produce the checkbook account of his clients' escrow trust fund rendered him in violation of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department, Section 691.12, concerning fiduciary responsibility to clients; maintenance of bank accounts; record keeping; examination of records.

Charge FOUR was sustained.

**CHARGE FIVE**

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law, by failing to honor a judicial subpoena duces tecum

served upon him and by failing to cooperate with a legitimate inquiry of the petitioner, the Grievance Committee for the Ninth Judicial District, as follows:

(1) Charges One, Two, Three and Four are repeated, reiterated and realleged as if more fully set forth herein.

(2) On or about April 22, 1987, respondent was personally served with a judicial subpoena so ordered by the Appellate Division, Second Department, requiring him to appear at the offices of petitioner on April 23, 1987, to give testimony under oath. Admitted

(3) On or about April 22, 1987, respondent was also personally served with a judicial subpoena duces tecum so ordered by the Appellate Division, Second Department, requiring him to produce at the office of petitioner on April 23, 1987, Admitted

Any and all papers, documents and records in your possession or control relating to your representation of Harry (Harris) Meyer:

Any and all bank records including, but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding any and all escrow accounts maintained for the period 1/1/85 to date, including, but not limited to, accounts at Chemical Bank, Citibank, Sterling National Bank and the Bank of India; Any and all bank records including, but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding account #0260077730355280407, entitled "Kenneth S. Knigin" maintained at the Sterling National Bank, 540 Madison Avenue, New York, New York, for the period 1/185 to date; and your ledger books or "similar records" for any and all of your escrow accounts maintained for the period 1/1/85 to date. Admitted

(4) Respondent, although appearing before petitioner to give testimony under oath on May 5, 1987, failed to produce any of

the documents and records pursuant to the aforesaid judicial subpoena duces tecum. Admitted

(5) At no time since, has respondent produced any of the documents subpoenaed. Admitted

SIXTH: Respondent, Kenneth S. Knigin, knew or should have known in committing the aforesaid acts, that he was violating the applicable statutes of the State of New York; the Code of Professional Responsibility of the New York State Bar Association effective January 1, 1970, as amended, including Disciplinary Rules 1-102(A), (4), (5) and (6), 9-102(A) and (B), and §691.12(a), (b), (e) and (f) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department [22 NYCRR §691.12] Denied

The respondent by verified answer admitted all factual allegations contained in subparagraphs (2), (3), (4) and (5) of this charge.

Being mindful that the Referee above has found that Charges One, Two, and Four have been sustained, together with respondent's admissions in regard to subparagraphs (2), (3), (4) and (5) of the instant charge, the respondent's denial of the allegations in paragraph Sixth was against the weight of credible evidence.

The respondent's contention that he failed to comply with the judicial subpoena duces tecum because, due to moving his office from New York City to his home, he was unable to locate any of the subpoenaed records, does not merit the Referee's belief.

Likewise, the respondent's contention that he lacked knowledge that he had misappropriated his client's escrow funds is contradicted by a preponderance of the credible evidence.

Charge FIVE was sustained.

In considering any appropriate sanction, the Referee urges consideration of the mitigating circumstances which caused the respondent to suffer with emotional distress related to an ongoing divorce. Additionally, the necessity to move respondent's law office from New York City to Westchester resulted in the storage of office records in a garage and a warehouse, creating difficulties in locating, retrieving and producing pertinent records subpoenaed by the Grievance Committee. Finally, the respondent made restitution in the amount of $26,500,

which so satisfied the client that he withdrew all charges.

Dated: September , 1989

Respectfully submitted,

/s/John J. Reilly
JOHN J. REILLY
Special Referee

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

6312s
C/ep

____AD2d____

LAWRENCE J. BRACKEN, J.P.
JOSEPH J. KUNZEMAN
GERALDINE T. EIBER
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

---

2941E
Motion Nos. 562 and 597 Atty

In the Matter of Kenneth S. Knigin,
a suspended attorney.

OPINION & ORDER

Grievance Committee for the Ninth Judicial District, petitioner;
Kenneth S. Knigin, respondent.

---

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar on April 6, 1955, at a term of the Appellate Division of the Supreme Court in the Second Judicial

Department, under the name Kenneth Sheldon Knigin. By order of this court dated April 15, 1988, the respondent was suspended from the practice of law pending the further order of this court based upon his failure to cooperate with the Grievance Committee in its investigation of allegations of professional misconduct. By order of this court dated June 2, 1988, this matter was referred to the Honorable John J. Reilly, a retired Judge of the Court of Claims, as Special Referee to hear and report.

Gary L. Casella, White Plains, N.Y. (Gary D. Egerman of counsel), for petitioner.

Myron Beldock, New York, N.Y., for respondent.

PER CURIAM In this proceeding the Special Referee sustained four charges of professional misconduct.

Charge One alleged that the respondent converted and/or failed to account for funds entrusted to him to be held in escrow, in that, after he was retained to represent a client in the sale of a co-operative apartment, he deposited the down payment of $17,900 into his money market account, entitled "Kenneth S. Knigin", in the State Bank of India, but failed to release these funds at the closing. Further, the balance in the account fell as low as $84 during the period of time the respondent should have been holding the funds, although no funds had been disbursed to his client.

Charge Two alleged that the respondent forwarded a check in the amount of $16,660.28 to the client referred to in Charge One, representing an "adjusted reimbursement of the escrow account" written on an account entitled "Kenneth S.

Knigin" at the Sterling National Bank and Trust Company, but when the check was presented for payment, it was returned as uncollectible because of insufficient funds.

Charge Three was not sustained by the Special Referee.

Charge Four alleged that the respondent failed to maintain, as required by 22 NYCRR 691.12(b), (e) and (f), and produce pursuant to subpoena duces tecum, a ledger book or similar record and records of all deposits and withdrawals for his attorney escrow account.

Charge Five alleged that the respondent failed to honor the aforementioned judicial subpoena duces tecum personally served upon him and failed to cooperate with a legitimate inquiry of the petitioner Grievance Committee for the Ninth Judicial District.

The petitioner moves to confirm the report of the Special Referee to the extent that it sustained Charges One, Two, Four and Five, and to otherwise disaffirm the report. The respondent cross moves to confirm the report to the extent that it failed to sustain Charge Three and to otherwise disaffirm the report.

After reviewing all of the evidence, we are in full agreement with the report of the Special Referee. The respondent is guilty of all of the professional misconduct outlined above. The petitioner's motion to confirm in part and disaffirm in part the report of the Special Referee is granted to the extent that it sustains Charges One, Two, Four and Five, and is otherwise denied. The respondent's cross motion is granted to the extent that the report is confirmed to the extent that it

failed to sustain Charge Three and it is otherwise denied.

The respondent is guilty of serious professional misconduct. Accordingly, the respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law effective immediately.

BRACKEN, J.P., KUNZEMAN, EIBER, SULLIVAN and BALLETTA, JJ., concur.

ORDERED that the petitioner's motion to confirm in part and disaffirm in part the report of the Special Referee is granted to the extent that the report is confirmed to the extent that it sustained parolled structure Charges One, Two, Four and Five and is otherwise denied; and it is further,

ORDERED that the respondent's cross motion to confirm in part and disaffirm in

part the report of the Special Referee is granted to the extent that the report is confirmed to the extent that it failed to sustain Charge Three and it is otherwise denied; and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent Kenneth S. Knigin, admitted under the name Kenneth Sheldon Knigin, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent shall continue to comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent Kenneth S. Knigin, admitted under

the name Kenneth Sheldon Knigin, is commanded to continue to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER:

Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

7716T
B/kr

LAWRENCE J. BRACKEN, J.P.
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN
GERALDINE T. EIBER
VINCENT R. BALLETTA, JR., JJ.

---

90-09627 Atty.

In the Matter of Kenneth S. Knigin, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District, petitioner,

Kenneth S. Knigin, respondent.

DECISION & ORDER ON MOTION

---

Motion by the respondent for leave to appeal to the Court of Appeals, pursuant to CPLR § 5602(a)(1)(i), from an order of this court dated October 1, 1990, disbarring him from the practice of law. The respondent was admitted to the practice of

law by this court on April 6, 1955, under the name Kenneth Sheldon Knigin.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BRACKEN, J.P., KUNZEMAN, SULLIVAN, EIBER and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of October, A.D. 1991

Present, HON. SOL WACHTLER, Chief Judge, presiding.

---

2 - Mo. No. 958

In the Matter of Kenneth S. Knigin, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

Respondent,

Kenneth S. Knigin,

Appellant.

---

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of January, A.D. 1992

Present, HON. SOL WACHTLER, Chief Judge, presiding.

---

Mo. No. 1363

In the Matter of Kenneth S. Knigin, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

Respondent,

Kenneth S. Knigin,

Appellant.

---

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

## POINT III

THE RESPONDENT HAS BEEN EFFECTIVELY DEPRIVED OF A FAIR HEARING AND OF PROCEDURAL DUE PROCESS

The essential guarantee of the due process clause of Article 14 of the United States Constitution is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property.

While different situations may entail different types of procedures, there is always the general requirement that the government process be fair and impartial. Therefore, there must be some type of neutral and detached decision-maker. The United States Supreme Court has continually held that "a fair trial in a fair

tribunal is a basic requirement of due process."

Procedural due process means that the problem of the propriety of the deprivation of life, liberty or property, under the circumstances, must be resolved in a manner consistent with essential fairness. The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one shall be personally bound until he has his day in Court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard.

Procedural due process has been woefully lacking in the case at bar. In the first instance both the Order including disbarment and the denial of Leave to Appeal to the Court of Appeals was rendered by the exact same panel of

Judges in the Appellate Division. Since the request for leave to appeal is made upon the allegation that the Court issuing the Order has improperly discharged its function, it is ludicrous to award that exact tribunal the duty of considering its own mistakes and then ask it to pass upon the procedure to correct the erros. Yet, it is apparent that was exactly the modus operandi in the Appellate Division.

Moreover, the impropriety was blatant. The Order providing for disbarment was issued October 1, 1990. The Order was so convoluted upon its face and so filled with inconsistencies as to encourage Respondent to immediately move for Leave to Appeal to this Court. That motion was returnable December 21, 1990. The Decision denying the motion was not issued until June 26, 1991 when the same panel of Judge's issuing the Order containing

disbarment next sat. Such a procedure does not constitute fair play particularly in the light of that panel's original failure to reach any other conclusion than "full agreement" with the Special Referee. A most serious disposition without a word of independent opinion and without any explanation of their failure to act upon the finding of mitigation. Similarly, the Decision denying Leave to Appeal was likewise without opinion.

By failing to provide Respondent with an appropriate impartial panel, to review the propriety of the application for Leave to Appeal the Appellate Division has effectively deprived Respondent of his right to a full and fair hearing. They disregarded their own finding in the first instance (mitigation) and then rubber stamped the obvious impropriety by blocking Respondent's effort to gain some

review of their actions. Without a complete process, there is no complete hearing and without a complete hearing there is no due process or fair play. Since it is well known that this Court accepts only approximately 6% of all of the requests for Leave to Appeal it must be presumed, under these unusual circumstances, that the Appellate Division would prefer to prevent any review of the Order.

This proceeding commenced in the Appellate Division. Both the Special Referee's report and the Order are filled with inconsistencies right upon their face. Further, serious issues exist requiring an evaluation as to why the Appellate Division failed to act upon its own findings of mitigation or explain a reason therefore. If no tribunal will review these inconsistencies and failures, Respondent can never ascertain the basis

for the lack of fair play in this proceeding. This is a clear example of denial of due process.

There is valid reason for this Respondent to expect that upon the findings and documentary evidence involved in this proceeding, a certain result could be reasonably anticipated. When the result is unreasonable and in complete contradiction to the findings and when the finding are themselves in conflict there is manifest a failure of procedural due process. There is no point to having a hearing if after resolving the findings, they are disregarded and a penalty is imposed which is universally reserved for determinations without mitigation.

It is therefore an imperative that the Respondent be permitted an opportunity to place the actions of the Appellate

Division before this Court in order that the requirements of due process be served.

**POINT IV**

THIS CAUSE IS A MATTER OF PUBLIC IMPORTANCE AND REQUIRE THE REVIEW OF THIS COURT

The findings and sanction herein verify the effort by the Appellate Division to punish Respondent to the detriment of the public at large.

The Order and Decision clearly recommend directly or by adoption mitigation in relation to the sanction. Since the Referee urged mitigation and the Appellate Division indicated "full agreement" it must be presumed that both tribunals, as a matter of law, were speaking to something less than the extreme sanction of disbarment.

Since the primary concern of this proceeding is to protect the public from inappropriate practitioners a recommendation of mitigation speaks to the fact that there is no necessity to protect the public indefinitely, if at all from this Respondent. Since mitigation speaks against disbarment the conclusion of mitigation identifies the Respondent as a person from whom the public requires no protection. Consequently, the sanction of disbarment is contrary to the public policy of maintaining a supply of worthwhile attorneys available for the public use. In the instant matter the Respondent has demonstrated himself to have been able, competent, truthful, fair, qualified and he has demonstrated a willingness to be of assistance to the public with or without fee. His historical background is demonstrated by his own account at para-

graphs 10, 11, 12 and 13 of his affidavit in support of this motion. Additionally, four New York State Supreme Court Justices attested to his performance (Exhibit D), and his biography appearing in Who's Who in American Law (Exhibit E) gives further evidence of his public contribution.

The sanction by the Appellate Division has served to remove the practitioner from the public forever. He is 62 years of age. It is unlikely, if the disbarment Order stands, that he will in his lifetime, ever practice law again. There is no rationale to support this denial of service to the public. Respondent's inability to practice law for the past three years has sent a clear message to the profession and has served as a consequential punishment of the Respondent. No purpose is served in the continuation of this status in the light of the findings

and issues of this matter. The sanction should be exposed to the light of the Appellate process.

No. 91-1676

Supreme Court, U.S.
FILED
MAY 12 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1991

KENNETH S. KNIGIN,

*Petitioner,*

*vs.*

GUY J. MANGANO, Individually and as Presiding Justice of the Appellate Division of the State of New York, Second Judicial Department and GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (NEW YORK),

*Respondents.*

*On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Judicial Department*

## BRIEF IN OPPOSITION FOR RESPONDENT GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

GARY L. CASELLA
*Attorney for Respondent*
*Grievance Committee for the*
*Ninth Judicial District*
399 Knollwood Road
Suite 200
White Plains, New York 10601
(914) 949-4540

GARY D. EGERMAN
*Of Counsel*

1980
Lutz Appellate Printers, inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

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No. 91-1676

In The

# Supreme Court of the United States

October Term, 1991

KENNETH S. KNIGIN,

*Petitioner,*

*vs.*

GUY J. MANGANO, Individually and as Presiding Justice of the Appellate Division of the State of New York Second Judicial Department and GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (NEW YORK),

*Respondents.*

*On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Judicial Department*

## BRIEF IN OPPOSITION FOR RESPONDENT GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

### PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's

application for a writ of certiorari based upon the denial, by order dated October 15, 1991, of the New York Court of Appeals to grant leave to appeal, [*Matter of Knigin*, 78 N.Y. 2d 860 (1991)] and further based upon the denial by order dated January 14, 1992 of the New York Court of Appeals to grant reargument for leave to appeal, [*Matter of Knigin*, 79 N.Y. 2d 851 (1992)] from the order of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, which on October 1, 1990 disbarred petitioner. *Matter of Knigin*, 162 A.D. 2d 82 (2nd Dept. 1990).

## STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

In this matter, petitioner was found guilty of four of the five charges of professional misconduct that had been lodged against him including conversion and failure to account for client funds that were entrusted to him to be held in escrow, issuing a check to a client for escrow funds from a non-escrow account with insufficient funds to cover the check, failing to maintain a duly constituted escrow account and commingling funds, failing to maintain and produce, pursuant to a *subpoena duces tecum,* a ledger book or similar record for his attorney escrow account, and failing to cooperate with respondent, Grievance Committee for the Ninth Judicial District of New York, in its investigation.

In disbarring petitioner, who was represented by counsel, after a full evidentiary hearing, the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York which had the benefit of the entire record to review, sustained the Report of the Special Referee it had assigned to hear and report.

Thereafter, petitioner's motion to the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York for leave to appeal to the Court of Appeals was denied by order dated June 26, 1991, his motion to the New York Court of Appeals to grant leave to appeal was denied by order dated October 15, 1991 and his motion to the Court of Appeals to grant reargument of his motion for leave to appeal was denied by order dated January 14, 1992.

## REASONS FOR DENYING THE WRIT

### I.

**Jurisdiction on writ of certiorari is not warranted in this matter.**

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Writ of Certiorari" and Rule 10(.1) states:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decisions of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course

> of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

United States Supreme Court Rule 10.

Although Rule 10(.1) is not exhaustive, the facts of the instant matter do not even remotely relate to the "character of reasons" that this Court will consider for a petition for a writ of certiorari.

Furthermore, this Court has held,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The issues involved in the instant matter do not reach the constitutional dimensions to be addressed by the United States Supreme Court nor do they present an "intellectually interesting and solid problem." Instead, petitioner is raising questions of fact which the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York in its jurisidiction, pursuant to its discretionary powers in attorney disciplinary matters in sustaining charges of professional misconduct, determined to warrant the sanction of disbarment. *New York State Judiciary Law, Section 90(2).*

## II.

**Petitioner has been afforded due process.**

The practice of law in the State of New York is a privilege, not a right. *Matter of Dondi*, 63 N.Y. 2d 331 (1984); *Matter of Capoccia*, 59 N.Y. 2d 549 (1983). An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968). It is well-settled that New York's statutory scheme concerning attorney disciplinary matters fully comports with federal constitutional guarantees of procedural due process. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1975).

Further, disciplinary proceedings,

> are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect

> the courts and the public from the official ministration of persons unfit to practice.

*In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970).

In the case at bar, petitioner had fair notice of the charges. He was served with a petition containing five separate alleged charges of professional misconduct. The issues raised by the petition and answer were then referred by the Appellate Division, Second Judicial Department to a Special Referee "to hear and to report, together with his findings upon each of the issues."

Thereafter, petitioner, who was represented by counsel, was afforded a full evidentiary hearing and had the opportunity to produce witnesses and introduce documents into evidence on his own behalf. After the Referee rendered his Report, both sides submitted motions to the Appellate Division, Second Judicial Department which within its authority determined whether or not the charges had been sustained. *In re Broome*, 13 A.D. 2d 657 (2nd Dept. 1961), *rev'd on other grounds*, 10 N.Y. 2d 942 (1961). Thus, petitioner received his federal constitutional guarantees of procedural due process, *Mildner v. Gulotta, supra*, and the mechanism utilized by the Appellate Division, Second Judicial Department did not abrogate petitioner's federally-protected rights. *Erdmann v. Stevens*, 458 F.2d 1205 (2nd Cir. 1972).

Petitioner's contention that the order of the Appellate Division, Second Judicial Department and the Report of the Special Referee contain inconsistent findings and conclusions is simply erroneous. The determination of whether petitioner was guilty of the charges is a question of fact (which is beyond the purview of this Court) and is not a question of law of constitutional proportions.

The October 1, 1990 order of the Appellate Division, Second

Judicial Department states, "After reviewing all of the evidence, we are in full agreement with the report of the Special Referee." (*see* petitioner's Exhibit II, A-31). This "full agreement" pertains to the findings that respondent had met its burden of proof by a fair preponderance of the credible evidence, *Matter of Capoccia, supra*, as to Charges One, Two, Four and Five of the petition which had been served on petitioner (*see* Resp. App. 1a). The "full agreement" does not refer to the mitigating factors set forth in the Referee's Report as petitioner maintains.

The issues raised by the petition and answer were referred to the Special Referee solely "to hear and to report" and the Referee is *not* empowered to determine or impose a sanction. *Matter of 3260 Perry Ave. Realty Corp.*, 285 A.D. 71 (1st Dept. 1954). The Appellate Division, Second Judicial Department, pursuant to its discretionary powers, is authorized to impose sanctions in attorney disciplinary matters. *New York State Judiciary Law, Section 90(2)*. As such, the Appellate Division, even after considering the mitigating factors set forth in the Report of the Special Referee, may impose the sanction of disbarment if the Court determines that such discipline is warranted based on the facts of the matter. The order may be rendered with or without explanation. *Mildner v. Gulotta, supra.*

## III.

**The sanction of disbarment is a matter of discretion and wholly justified by the facts of this matter.**

The Appellate Division, Second Judicial Department of the Supreme Court of the State of New York has consistently deemed appropriate the sanction of disbarment when an attorney has converted escrow funds entrusted to him, failed to maintain a duly constituted escrow account, failed to maintain a ledger book or similar record and failed to honor a judicial *subpoena duces*

*tecum*. *See, e.g., Matter of Wiacek*, 150 A.D. 2d 4 (2nd Dept. 1989); *Matter of Thomas*, 150 A.D. 2d 123 (2nd Dept. 1989).

Furthermore, the sanction of disbarment has been imposed on attorneys where there has been a finding of conversion of escrow funds even when the Appellate Division, Second Judicial Department has taken mitigating factors placed on the record into consideration. *See, e.g., Matter of D'Alvia*, 168 A.D. 2d 71 (2nd Dept. 1991); *Matter of Dolan*, 168 A.D. 2d 1 (2nd Dept. 1991); *Matter of Tahlor*, 164 A.D. 2d 510 (2nd Dept. 1991); *Matter of Schwartz*, 131 A.D. 2d 276 (2nd Dept. 1987).

In the instant matter, petitioner was found guilty of conversion and failure to account for funds that were entrusted to him to be held in escrow, issuing a check to a client from a non-escrow account for escrow purposes with insufficient funds to cover the check, failing to maintain a duly constituted escrow account and commingling funds, failing to maintain and produce, pursuant to a judicial *subpoena duces tecum*, a ledger book or similar record for his attorney escrow account and failing to cooperate with respondent in its investigation.

The State of New Jersey has a per se disbarment rule where an attorney misappropriates funds. *Matter of Wilson*, 81 N.J. 451 (1979). This view has been expressed in New York too. *See, e.g., Matter of Pressment*, 118 A.D. 2d 270 (1st Dept. 1986); *Matter of Marks*, 72 A.D. 2d 399 (1st Dept. 1980).

The sanction of disbarment imposed on petitioner was neither cruel, unusual or excessive based upon the facts of this matter.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
*Attorney for Respondent*
*Grievance Committee for the*
*Ninth Judicial District*

GARY D. EGERMAN
*Of Counsel*

## APPENDIX A — NOTICE OF PETITION AND PETITION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED MARCH 17, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of KENNETH S. KNIGIN, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

KENNETH S. KNIGIN,

Respondent.

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Kingdon P. Locker, Chairman of the Grievance Committee for the Ninth Judicial District, verified on the 17th day of March, 1988, a motion will be made before this Court at the courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 22nd day of April, 1988 at nine-thirty o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing that the respondent, KENNETH S. KNIGIN, as an attorney and counselor-at-law, be

disciplined upon the charges set forth in the annexed petition and for such other or further action upon the charges embodied in the annexed petition, as justice may require, and for such other and further relief as may be just and proper. Respondent shall serve and file two copies of his answer with proof of service on or before the return date.

DATED: White Plains, New York
March 17, 1988

Yours, etc.

GARY L. CASELLA
Attorney for Petitioner

GARY D. EGERMAN
Of Counsel

Office & P.O. Address
200 Bloomingdale Road
White Plains, NY 10605

TO: Kenneth S. Knigin
Respondent
33 West Patent Road
Bedford Hills, NY 10507

*Appendix A*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of KENNTH S. KNIGIN, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

KENNETH S. KNIGIN,

Respondent.

PETITION

TO THE HONORABLE, THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

The petition of the Grievance Committee for the Ninth Judicial District respectfully alleges that:

FIRST: By order of this Court, dated and filed February 29, 1988, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding in this Court against Kenneth S. Knigin based on the acts of professional misconduct as set forth in the Confidential Report of the Grievance Committee for the Ninth Judicial District filed

with the Court. Further, said order appointed Gary L. Casella as attorney for the petitioner in this proceeding.

SECOND: Said order of February 29, 1988 was duly made and filed by this Court pursuant to the authorization of § 90 of the Judiciary Law and pursuant to § 691.4 of the Rules Governing the Conduct of Attorneys of this Court.

THIRD: The respondent, Kenneth S. Knigin, was admitted to practice as an attorney and counselor-at-law in the courts of the State of New York by the Appellate Division of the State Supreme Court, Second Judicial Department, on April 6, 1955 under the name Kenneth Sheldon Knigin.

FOURTH: Upon information and belief at all times hereinafter mentioned, respondent engaged in the practice of law in the State of New York and maintained offices for said purpose in Westchester County, New York.

FIFTH: Upon information and belief, respondent, Kenneth S. Knigin, has been guilty of illegal, corrupt and unethical practices and of professional misconduct and conduct prejudicial to the administration of justice as an attorney and counselor-at-law in that:

CHARGE ONE

Respondent, Kenneth S. Knigin, has been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation by converting and/or failing to account for funds that were entrusted to him to be held in escrow, as follows:

(1) Harvey Meyer retained respondent in or about

1985 to represent him in the sale of his cooperative apartment.

(2) Respondent prepared the contract of sale and the downpayment in the amount of $17,900.00 was deposited into respondent's money market account, #2111234524101, entitled "Kenneth S. Knigin," maintained at State Bank of India on or about February 21, 1985.

(3) The closing occurred on April 25, 1985. Respondent, despite demands from Meyer, did not release the downpayment which he was holding in escrow at that time.

(4) The bank records of respondent's money market account #2111234524101, maintained at the State Bank of India reflect that as of February 22, 1985 the balance in the account had fallen to $3,905.00. The balance as of March 4, 1985 was $123.00 and the closing balance as of April 5, 1985 was $84.00 as a result of respondent having converted escrow funds entrusted to him. During this entire period, respondent was required to hold $17,900.00 in escrow.

CHARGE TWO

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and that adversely reflects on his fitness to practice law as follows:

(1) Charge One is repeated, reiterated and realleged as if more fully set forth herein.

*Appendix A*

(2) In or about August, 1985 respondent forwarded to Meyer a check in the amount of $16,660.28 which represented an "adjusted reimbursement of the escrow account."

(3) The check was written against an account maintained by respondent at Sterling National Bank and Trust Company, account #035-52804-07, which account is entitled "Kenneth S. Knigin." In testimony before petitioner on May 5, 1987 respondent stated under oath that said account was a business checking account and not an escrow, trust or special account.

(4) When Meyer presented the check for payment, it was returned as uncollectible because of insufficient funds.

(5) In or about December 1985, respondent allegedly admitted his wrongful conduct and paid Meyer the sum of $20,000.00 which amount represented the downpayment of $17,900.00 plus interest due Meyer from the time of the April 1985 closing.

CHARGE THREE

Respondent has been guilty of engaging in conduct that adversely reflects on his fitness to practice law by failing to maintain a duly constituted escrow account and of commingling funds as follows:

*Appendix A*

(1) Charges One and Two are repeated, reiterated and realleged as if more fully set forth herein.

(2) Respondent maintained an escrow account, #02870544, entitled "Kenneth S. Knigin, Special," at Citibank for the period April 1980 to July 1981 in which account respondent commingled clients' and personal funds and caused check to be issued for both escrow and personal obligations.

CHARGE FOUR

Respondent, Kenneth S. Knigin, has been guilty of engaging in conduct that adversely reflects on his fitness to practice law, by failing to maintain and produce, pursuant to subpoena, a ledger book or similar record and records of all deposits and withdrawals for his attorney escrow account, as follows:

(1) Charges One, Two and Three are repeated, reiterated and realleged as if more fully set forth herein.

(2) The Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department § 691.12(b), (e) and (f) (22 NYCRR § 691) require an attorney, *inter alia,* to maintain a ledger book or similar record for all special accounts as well as the records of all deposits and withdrawals from such accounts for a period of seven years after the events which they record and to produce those records in response to a subpoena duces tecum.

*Appendix A*

(3) Failure to maintain and/or produce the aforesaid records as set forth above, subjects the attorney to disciplinary proceedings.

(4) Respondent has failed to comply with § 691.12(b), (e) and (f) of the Rules Governing the Conduct of attorneys of the Appellate division, Second Judicial Department. [22 NYCRR § 691(b)(e)(f)].

CHARGE FIVE

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law, by failing to honor a judicial subpoena duces tecum duly served upon him and by failing to cooperate with a legitimate inquiry of the petitioner, Grievance Committee for the Ninth Judicial District, as follows:

(1) Charges One, Two, Three and Four are repeated, reiterated and realleged as if more fully set forth herein.

(2) On or about April 22, 1987 respondent was personally served with a judicial subpoena so ordered by the Appellate Division, Second Department, requiring him to appear at the offices of petitioner on April 23, 1987 to give testimony under oath.

(3) On or about April 22, 1987 respondent was also personally served with a judicial subpoena

duces tecum so ordered by the Appellate Division, Second Department requiring him to produce at the office of petitioner on April 23, 1987,

> Any and all papers, documents and records in your possession or control relating to your representation of Harry (Harris) Meyer; Any and all bank records including, but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding any and all escrow accounts maintained for the period 1/1/85 to date, including, but not limited to, accounts at Chemical Bank, Citibank, Sterling National Bank and the Bank of India; Any and all bank records including but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding account #0260077730355280407 entitled "Kenneth S. Knigin" maintained at the Sterling National Bank, 540 Madison Avenue, New York, New York, for the period 1/1/85 to date; and your ledger books or "similar records" for any and all of your escrow accounts maintained for the period 1/1/85 to date.

(4) Respondent, although appearing before petitioner to give testimony under oath on May 5, 1987, failed to produce any of the documents and records pursuant to the aforesaid judicial subpoena duces tecum.

(5) At no time since, has respondent produced any of the documents subpoenaed.

SIXTH: Respondent, Kenneth S. Knigin, knew or should have known in committing the aforesaid acts, that he was violating the applicable statutes of the State of New York; the Code of Professional Responsibility of the New York State Bar Association effective January 1, 1970, as amended, including Disciplinary Rules 1-102(A), (4), (5) and (6), 9-102(A) and (B), and § 691.12(a), (b), (e) and (f) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department. [22 NYCRR § 691.12]

SEVENTH: The source of petitioner's knowledge and the grounds for its belief are the facts in evidence as set forth in the report of the Grievance Committee for the Ninth Judicial District filed with the Appellate Division, Second Department.

WHEREFORE, petitioner prays that an order directing that respondent, Kenneth S. Knigin, an attorney and counselor-at-law be disciplined upon the charges as set forth herein and for such other action as may be contemplated by § 90 of the Judiciary Law of the State of New York.

s/ Kingdon P. Locker
KINGDON P. LOCKER

DATED: White Plains, New York
March 17, 1988